78-1482

Supreme Court, U. S.
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SUPREME COURT OF

THE UNITED STATES

October Term of 1978

AN APPEAL FROM THE
SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

ELMER L. MEYERS
APPELLANT

VS.

CLAYTON CHILCOTE
APPELLEE

CASE NO.

Counsel of Record

ELMER L. MEYERS
Attorney Pro Se
2278 Baltimore Avenue
Cincinnati, Ohio 45225

WALTER C. BEALL
Attorney for Appellee
200 Dixie Terminal Building
Cincinnati, Ohio 45202

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SUPREME COURT OF
THE UNITED STATES

ELMER L. MEYERS, :
APPELLANT :
VS. : No.
CLAYTON CHILCOTE, :
APPELLEE :

This is a matter on appeal to the Supreme Court of the United States involving a substantial constitutional question and the appeal is taken pursuant to Title 28 USC § 1257 (2).

The following questions are presented by this appeal;

1. Denial of Due Process of the Appellant under the Fifth and Fourteenth Amendment of the United States Constitution.

2. Denial of the Appellant's Day in Court as is guaranteed by the Constitution of the United States.

3. Not being duly served.

4. Abuse of Discretion by the trial court and misconduct and lack of discretion.

5. Denial of a hearing as is required by the Civil Rules of Procedure.

NATURE OF THE PROCEEDINGS

I. STATEMENT OF THE CASE:

This is an appeal to the Supreme Court of the United States from the final

judgment of December 27, 1978 on a motion for reconsideration of denial of jurisdiction of the court's December 1, 1978 decision; dismissing appellant's appeal to the Supreme Court of the State of Ohio. Notice of Appeal in this matter was filed January 11, 1979 and a copy thereof is attached.

Plaintiff-Appellant filed complaint in the Hamilton County Common Pleas Court on September 24, 1975 being Case A-757779, styled Elmer L. Meyers V. Clayton Chilcote, for malicious prosecution. On May 5, 1977 the complaint was dismissed for failure to prosecute. On May 16, 1977 plaintiff's motion to relieve or strike was overruled and on July 6, 1977 was appealed to the Court of Appeals. On August 2, 1978 the Court of Appeals affirmed the judgment and on August 31, 1978 was appealed to the Supreme Court of Ohio.

II. STATEMENT OF FACTS:

On September 24, 1975 in Common Pleas Court, Plaintiff-Appellant sued Defendant-Appellee for malicious prosecution; Defendant-Appellee had brought a false charge sworn to under oath by a false affidavit against Plaintiff-Appellant.

On February 13, 1976 a report was held and both parties attended, having received notice by mail.

On April 21, 1976 plaintiff-appellant received, by regular mail, from adverse party's counsel, a copy of an entry dismissing his action under Civ. R. 41 (B) (1), plaintiff failed to prosecute. This copy of the entry was not dated, stamped, signed, nor filed or journalized. Since the entry was not filed with the clerk for journalization nor at any time whatsoever journalized or entered to the appearance docket as required by Civ. R. 58, there is no dismissal or effective judgment.

> The 1971 amendment of rule 58 defines a judgment effective only when filed with the clerk for journalization---- when filed the clerk should stamp it immediately and journalize it promptly.

At no time has the defendant-appellee demonstrated he holds an effective dismissal entry of April 21, 1976 such as stamped "Entered" by the clerk and dated when filed.

At no time, as required by Civ. R. 41 (B) (1), was a motion to dismiss served on the plaintiff-appellant.

During the month of April, 1976 reports were scheduled and not once did plaintiff-appellant receive notice. The case was set for report on April 12, 1976, continued for report on April 21, 1976 and not once was the plaintiff-appellant served notice or duly served by motion that his case would be dismissed.

On April 17, 1977 a Motion To Strike or Relieve from Judgment was filed to correct the error of the trial judge and trial court and the memorandum of this motion called for the case to proceed to trial.

> Since there is not an effective judgment entered, as called for in the rules of civil procedure, the April 17, 1977 motion is filed in reasonable time.

On April 28, 1977, the trial court denied plaintiff's motion and would not set a trial date and on May 16, 1977 dismissed plaintiff's complaint.

ARGUMENT

Plaintiff-Appellant in his appeal to the Court of Appeals assigned two errors of the trial court which are:

I. FIRST PROPOSITION OF LAW:

The motion to dismiss should not have been granted because a motion to dismiss was not served upon plaintiff as is required by Civ. R. 41 (B) (1). The Court of Appeals takes the position "In the absence of any evidence to the contrary, we presume that defendant's motion to dismiss was granted after full compliance with Civ. R. 41 (B) (1)."

Plaintiff-Appellant argues that there was not full compliance with the rule and says;

(A) For dismissal of an action under Civ. R. 41 (B) (1), failure to prosecute, there must be a motion and duly served upon the adverse party. There was no motion. Such conduct denied the plaintiff his right to oppose a motion.

(B) Under Rule 58 the judgment or entry of dismissal is not effective. At no time was the entry journalized or entered to the appearance docket. As in Rankin V. Coffer, App. 1961, 174 N.E. 2d 631,85 O.L.A. 391.,--------entries become effective only when entered of record. Then in Boyle V. Public Adjustment & Const. Co., 1950,87 Ohio App. 264,93 N.E. 2d 795,42 O.O. 478,57 O.L.A. 129 The pronouncement, written or oral, of a Judge is not action of a court unless it is entered upon the journal. The 1971 amendment of rule 58 defines a judgment effective only when filed with the clerk for journalization--------when filed the clerk should stamp it immediately and journalize it promptly. There is no evidence of any entry of dismissal being filed at any time in 1976 nor prior to May 5, 1977. The only evidence of an entry of dismissal being filed with the clerk is the entry of May 5, 1977 stamped "Entered May 5, 1977, Image 254."

On April 21, 1976 this case was set for report. When the plaintiff failed to appear

it was dismissed under Civ. R. 41 (B) (1). This dismissal was not filed with the clerk for journalization, not stamped, not entered. This dismissal was then entered over a year later on May 5, 1977. The rule requires notice to plaintiff's counsel of the motion for dismissal before the court before such dismissal can be effective.

It is a point of contention whether the plaintiff-appellant received notice of the reports. Plaintiff-Appellant contends that he received no notice of anything. Defendant-Appellee argues otherwise. However, it is even admitted by the defendant-appellee in his memorandum that the case was set for report on April 21, 1976 only. The case was not set for a hearing on a motion to dismiss.

However, as stated, Rule 41 (B) (1) requires notice to the plaintiff's counsel of the motion to dismiss. As this was not done such dismissal by the trial court was improper and must be reversed by this court. What should have been done under the Rules in this case; when the plaintiff failed to appear for the April 21, 1976 report, the case should have been set down at a subsequent date for "motion to dismiss." A notice should have been mailed to plaintiff informing him of the new date and motion before the court. If plaintiff then failed to appear at this date, the case would have

been dismissed. As this was not done, plaintiff's rights under the Ohio Rules of Civil Procedure were violated and thusly the dismissal was improper and void.

II. SECOND PROPOSITION OF LAW:

The plaintiff-appellant says there is abuse of discretion and that the judgment herein can be set aside under Civ. R. 60 (B). The Court of Appeals takes the position there is no such abuse. Plaintiff-Appellant argues;

(A) In April of 1976 reports were scheduled by the trial court for April 12, 1976 and continued to April 21, 1976 and plaintiff-appellant not once received notice of the scheduled reports or the motion to dismiss, as is required by Rule 41 (B) (1). Plaintiff-Appellant argues he was not duly served and was not made aware of any such reporting and that such conduct of the trial court is in violation of his constitutional rights, due process of law, one's day in court, and one's rights under the Fourteenth Amendment of The Constitution of the United States and the State of Ohio. In Wabash-Portland Cement Co. V. State Dept. of Highway, 1955,98 Ohio App. 209,128 N.E. 2d 847,570. 0. 242. "--------defendant had no notice and opportunity to be heard in opposition--------, order of --------was abuse of discretion."

(B) The plaintiff-appellant, the one being the party bringing the action, the pursuer; it would be absurd and most illogical to argue that he ignored the hearings or reports scheduled in April of 1976 and any accusation that he was properly notified is clearly erroneous. Plaintiff-Appellant must demand supporting proof of service such as a green signature card as is done by certified mail.

(C) Furthermore, being denied the right to attend the April 1976 scheduled report hearings, not being duly served, further adding to the abuse of discretion; the case at no time was set for a hearing on a motion to dismiss.

(D) The trial court failed to comply with the requirements of Civ. R. 41 (B) (1) and such failure constitutes mistake or inadvertence by the trial court. Also part (5) of rule 60 (B), "any other reasons justifying relief" was a basis for the plaintiff's motion to strike or relieve from judgment. In chambers the court found that the appellant received notice. But for the reasons stated supra, the court had no basis for such a finding. Also the court found that the plaintiff's motion was not filed within a reasonable time after dismissal. However, the docket reveals that the motion to relieve was filed prior to this entry of

dismissal of May 5, 1977 and that plaintiff's motion of April 19, 1977 called the case for trial, and that therefore the motion was filed within a reasonable time as no appealable order or judgment existed until May 5, 1977 under Rule 12(a) of the Ohio Appellate Rules. To rule that the motion to strike or relieve from judgment was not filed in reasonable time is without merits.

(E) The trial court found also that the plaintiff did not have a meritorious claim and it is argued that a proper reading of plaintiff-appellant's amended complaint does most certainly present a meritorious claim, and the court was clearly in error to rule to the contrary. Further, it is submitted and argued that the court should have held a formal hearing with plaintiff's testimony to make such a determination regarding the claim. Herein on April 28, 1977, when the trial court denied plaintiff's motion, plaintiff was present in court, but testimony was not taken as the motion was decided in judge's chambers and for this the court erred.

(F) Considering disregard for the rules, the mistakes of the trial court, all the wrongs and errors by the court, derogatory remarks written on the original Common Pleas court case jacket, and abuse of discretion, that there exists to a degree misconduct under Civ. R. 60 (B) (3), "------ or other misconduct of an adverse party."

The Fourteenth Amendment to the Constitution of the United States and Article I, Section Two and Sixteen of the Ohio Constitution of 1851 guarantees due process to the citizens of the State of Ohio. In Re. Appropriation, 104 App. 243, 148 N.E. 2d 242. Prior to a person being denied a valuable right or property he must be afforded "due process." In this case reference is to procedural due process which guarantees a person the right to a procedure, a way of doing something, that allow him to guard a valuable right as may be given by statute or in the Civil Rules, or any other substantive rights.

A notice of proceedings and an opportunity to be heard at such hearing is the minimum required by the Constitutional provisions heretofore cited. This cause leans strongly on reasonable time and not being duly served and so there exists a substantial constitutional question; should one be heard; be entitled to due process of law, one's day in court and one's right under the Constitution of the United States and the State of Ohio. Such issues should be considered a matter of great interest and the protection of such a matter should not be impaired or impeded.

The trial court failed to use discretion in that it did not exercise any function of supervision so as to protect that valuable procedural due process rights of the plaintiff with respect to the scheduled report

hearings of which plaintiff was not notified.

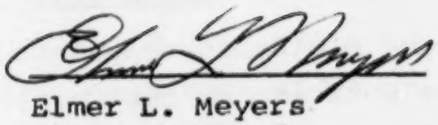
CONCLUSION

The plaintiff-appellant takes exception to the decision by the Court of Appeals affirming the judgment of the trial court. The court could not have fully considered the assignments of error nor could they have taken into consideration the fact that due process of law did not prevail, that plaintiff-appellant was not duly served and this denied his constitutional right to his day in court and his right to be heard.

Plaintiff-Appellant urges the Court to take jurisdiction and give him relief from the wrongful judgment; that mistakes, wrongs, errors by the court, prejudice toward him based on certain derogatory remarks written on the original Common Pleas Court case jacket, and violation of constitutional rights exist.

The appeals court erred by not reversing the decision of the trial court and by not ordering the original action to be set for trial in Hamilton County Common Pleas Court, Plaintiff-Appellant urges the Supreme Court of the United States to accept this appeal and give him his day in court as guaranteed him by the Constitution of the United States and the State of Ohio.

Dated: March 26, 1979



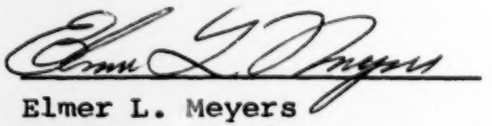
Elmer L. Meyers
Attorney Pro Se
2278 Baltimore Avenue
Cincinnati, Ohio 45225
(513)542-8888

SUPREME COURT OF THE UNITED STATES

ELMER L. MEYERS APPELLANT	:	
VS.	:	No.
CLAYTON CHILCOTE APPELLEE	:	PROOF OF SERVICE

I have this date delivered a copy of the Jurisdictional Statement and the Appendix to the Jurisdictional Statement, by personal delivery to the Attorney for the Appellee, Beall, Hermanies and Bortz, Walter C. Beall of Counsel, 200 Dixie Terminal Building, Cincinnati, Ohio 45202, this day of March 26, 1979.

Date: March 26, 1979



Elmer L. Meyers
Attorney Pro Se
2278 Baltimore Avenue
Cincinnati, Ohio 45225
(513)542-8888